

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Digital Audio Broadcasting Systems)
And Their Impact On the Terrestrial Radio)
Broadcast Service)

MM Docket No. 99-325

To: The Commission

**OPPOSITION OF NATIONAL PUBLIC RADIO TO
APPLICATIONS FOR REVIEW**

Introduction

National Public Radio, Inc. ("NPR") hereby files its Opposition to the Applications for Review of the recent Media Bureau Order¹ filed by Prometheus Radio Project and Press Communications, LLC ("Prometheus" and "Press," respectively) in the above-captioned matter.²

Best known for producing such noncommercial programming as *All Things Considered*, *Morning Edition*, and *Talk of the Nation*, NPR is a non-profit membership organization of more than 800 public radio stations licensed to community organizations, local school boards, private and public colleges and universities, and other local institutions, many of which have undertaken the transition to in-band, on-channel ("IBOC") digital audio broadcasting ("DAB"). NPR also

¹ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Order, MM Docket 99-325, 25 FCC Rcd. 1182 (2010) (Media Bureau) [hereinafter "Order"].

² Application for Review of Prometheus Radio Project, MM Docket No. 99-325 (filed May 10, 2010) [hereinafter "Prometheus Application"]; Application for Review and Request for Stay of Press Communications, LLC, MM Docket No. 99-325 (filed May 10, 2010) [hereinafter "Press Communications Application"].

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houses NPR Labs, the only not-for-profit broadcast technology research and development center in the United States.

The Federal Register notice of the Order succinctly summarized the Order's purpose:

The increase in FM hybrid digital ERP will allow an FM station's digital coverage area to more closely replicate its licensed analog coverage area, and the interference mitigation and remediation procedures will make certain that permissible increases in FM digital ERP do not adversely affect existing FM analog operations. These rule changes balance the immediate need for improved FM digital coverage with the continued need to limit interference from digital FM facilities to FM analog stations.³

Replication of analog coverage without interference to adjacent analog service within the adjacent station's protected service contour is precisely what the Commission sought to achieve in authorizing HD Radio and in delegating authority to the Bureau to implement necessary technical changes to facilitate the HD Radio transition.⁴

NPR previously responded to an application for review filed by Jonathan Hardis shortly after the Order was published.⁵ NPR demonstrated why the Order was within the authority delegated by the Commission to the Media Bureau. Though neither Prometheus nor Press challenges the Bureau's authority to issue the Order, NPR refers the Commission to, and hereby

³ 75 Fed. Reg. 17874 (Apr. 8, 2010).

⁴ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, First Report and Order, MM Docket 99-325, 17 FCC Rcd. 19990, 20001 (2010) ("Coverage for both [AM and FM] systems would be at least comparable to analog coverage."); id., 17 FCC Rcd. 19995 ("With mature services, such as AM and FM broadcasting, the introduction of additional RF energy into these heavily used bands can affect the reception of distant stations. . . . We conclude that the tradeoffs that hybrid mode operations may require are consistent with well-established broadcast interference policies.").

⁵ Opposition of National Public Radio, Inc., MM Docket No. 99-325 (filed Apr. 23, 2010) [hereinafter "Opposition to the Hardis Application"].

incorporates by reference, NPR' prior filing on the matter.⁶ The Prometheus and Press Applications seek review instead based on perceived errors in the Order itself. Neither Application, however, presents a valid basis on which to grant review.

I. Though Citing "Procedural Error," The Prometheus Application Amounts To A Policy Difference Regarding The Merits of HD Radio Not Warranting Commission Consideration

The Prometheus Application seeks review based on prejudicial procedural error, citing the Bureau's alleged failure "to discuss or consider any of the substantive concerns and recommendations submitted by Prometheus and other affected parties."⁷ Rather than citing one or more particular Bureau actions that constituted procedural error, the Prometheus Application characterizes the Order as amounting to an arbitrary and capricious agency decision under the standard applicable to judicial review.⁸ While Prometheus contends that the Bureau failed to consider or discuss its objections to the HD power increase, its real objection is to the outcome rather than the process by which the outcome was reached.

In seeking to cast the Order as arbitrary and capricious, the Prometheus Application first misrepresents the findings of the NPR Labs Digital Radio Coverage & Interference Analysis (DRCIA) Research Project Report.⁹ Prometheus quotes a Report conclusion that substantial interference to analog reception could occur as a result of a blanket 10 percent IBOC

⁶ Opposition to the Hardis Application at 2-6.

⁷ Prometheus Application for Review at 1.

⁸ Id. at 5 (citing Motor Vehicle Manufacturers Ass'n v. State Farm Mutual automobile Ins. Co., 463 U.S. 29, 42-43 (1983)).

⁹ Final Report, Digital Radio Coverage & Interference Analysis (DRCIA) Research Project, submitted in MM Docket No. 99-325 (July 18, 2008) [hereinafter "DRCIA Report"].

transmission power increase,¹⁰ but it fails to mention that the DRCIA testing considered reception without regard for the Commission's protected service contours.¹¹ Thus, substantial interference was predicted to occur, but beyond the point of protection under the Commission's current rules. In addition, the Bureau's Order actually authorized a significantly smaller power increase than had been proposed and the DRCIA testing assumed.¹²

Prometheus also refers to an article in *RadioWorld* addressing the preliminary results of the Advanced IBOC Compatibility and Coverage Study ("AICCS").¹³ For several reasons, the quoted language does not support Prometheus's claim of a conflict between the Order and the AICCS. First, compared to the preliminary AICCS report, the final AICCS Report contained an important adjustment for time variability, based on the chart in the Commission's report R-6602.¹⁴ This adjustment applies an 8 dB correction factor to the median signals, which adjusts the measured 1% IBOC interference criterion of 14 dB D/U to 6 dB D/U, when applied to the Commission's conventional F(50,50) and F(50,10) curves. This has the effect of allowing closer spacings than is apparent from the *RadioWorld* chart, as well as producing less interference at larger contour spacings.

¹⁰ Prometheus Application at 3.

¹¹ See DRCIA Report at 4.

¹² Order, 25 FCC Rcd. at 1189.

¹³ Prometheus Application at 5. See www.radioworld.com/article/89178.

¹⁴ Report to the FCC on the Advanced IBOC Coverage and Compatibility Study, MM Docket 99-325, at 30, Figure 27, submitted Nov. 4, 2009 [hereinafter "AICCS Report"]. Report R-6602 correlates the average power in the F50-50 service contours with the average, reduced time variability of the F50-10 interference contours for purposes of comparing expected interfering energy to service contour values.

Second, the likelihood of interference arises where stations are at minimum spacing, which represents no more than 9% of overall first adjacent station relationships. Of that number, the segment of the listening audience affected tends to be those in the direction of the interfering station's transmitter at or just inside the protected contour.

Third, the Order incorporated significant interference remediation measures to address any harmful interference that may arise.¹⁵ Thus, the Order requires cooperation among the stations involved to resolve the issue, with the prospect of mandatory power reductions if the matter is not resolved.¹⁶ The Bureau also promised to revisit the entire matter if interference proved to be a more significant problem than indicated by the record of the proceeding.¹⁷

Prometheus also challenges the Order based on NPR's further testing of mobile reception, claiming that the usefulness of the testing was limited because the AICCS testing did not examine indoor coverage.¹⁸ What Prometheus ignores, however, is that indoor and portable FM receivers were tested in large numbers in the DRCIA study, and population-based map studies using the receiver data indicated that a limited number of indoor listeners would be affected at the -10 dBc power level.¹⁹ The AICCS Report also offered a formula for increases above 4%

¹⁵ Order, 25 FCC Rcd. at 1192-93.

¹⁶ Id. at 1193.

¹⁷ Id.

¹⁸ Prometheus Application at 5 ("Although NPR did conduct tests of potential improvement to indoor digital reception, interference to analog was only studied in the mobile context.").

¹⁹ DRCIA Report at 4-5. It is also important to note that the "loss" referred to in the DRCIA Report is the increase in population that are below the established service quality (40 dB weighted quasi-peak audio signal-to-noise ratio), not a tune-out ratio. The DRCIA measurements were strictly instrument-, not listener-, based.

that limited the power increase based on distance and facilities criteria.²⁰ Finally, the power increase jointly proposed by NPR and iBiquity recommended a process for addressing harmful interference.²¹

While Prometheus then proceeds to quote extensively from the Order, ostensibly to demonstrate that the Bureau ignored significant flaws in the testing, the quoted excerpts are entirely supportive of the resulting power increase authorization.²² The testing showed that interference to indoor and portable reception of protected analog service is not likely to occur to a significant extent.²³ By limiting the blanket power increase to 4% and increases above that amount based on distance and facilities criteria, the Bureau also limited the potential for interference to mobile reception.²⁴ Finally, as noted above, the Order established a process for remediating interference and promised to re-open the entire matter if necessary.²⁵

The Prometheus Application cites several other alleged Bureau failures, but all of these can be easily dismissed. Thus, Prometheus generally disparages HD Radio as not serving the public interest,²⁶ but that contention flies in the face of the Commission's decision authorizing

²⁰ See AICCS Report at 31, Figure 28.

²¹ See Ex Parte Letter from Gregory A. Lewis, Counsel for NPR, and Albert Shuldiner, Counsel for iBiquity Digital Corporation, at 2-3, MM Docket No. 99-325, submitted Nov. 5, 2009.

²² See Prometheus Application at 6.

²³ DRCIA Report at 5-6.

²⁴ Order, 25 FCC Rcd. at 1189.

²⁵ Id. at 1191-93.

²⁶ See Prometheus Application at 7-8.

stations to implement HD Radio operations.²⁷ Prometheus next questions approving a power increase while two petitions for reconsideration of the Commission's Second Report and Order in this proceeding remain outstanding and without imposing additional public interest obligations.²⁸

As NPR demonstrated in its Opposition to the Hardis Application, however, there is no legal or policy justification for granting an application for review based on a pending petition for reconsideration of a prior Commission decision.²⁹ Likewise, imposing additional public interest obligations is not a condition precedent to authorizing stations to increase power simply to serve their existing coverage area.³⁰

Prometheus objects to the Order's potential consequences for low power FM stations.³¹ As the Bureau explained in some detail, however, low power FM stations are secondary services under the Commission's rules and not entitled to the same interference protection as are primary services.³² Prometheus now claims that the Bureau overlooked its argument that low power FM stations should be treated as primary services in relation to full power stations operating digitally. Such an argument is far from evident from Prometheus's ex parte comments, however, and, even if it were, it would require a fundamental change in policy well in excess of the Bureau's

²⁷ See In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Report and Order, 17 FCC Rcd. 19990, 20006 (2002).

²⁸ Prometheus Application at 8.

²⁹ Opposition to the Hardis Application at 10-11.

³⁰ Order, 25 FCC Rcd. at 1193 n.56 ("The . . . request to first resolve the public interest obligations of digital radio licensees is both beyond the scope of this proceeding and seeks action which exceeds the Bureau's delegated authority.").

³¹ Prometheus Application at 9.

³² Order, 25 FCC Rcd. at 1190-91.

authority.

Finally, Prometheus contends that the Bureau failed to address several alternatives to the power increase authorized in the Order. Some of these alternatives, such as asymmetrical digital side band power are, in fact, under active development, but they are currently not a viable alternative to the power increase authorized in the Order. Other alternatives, such as reallocation of TV channels 5-6 and improving receiver and antenna performance, exceed the scope of the Bureau's authority or are not compelled by the record.³³ This is not a case, therefore, where the Bureau failed to consider an argument directed to the central issue before it.³⁴

II. The Press Communications Application for Review and Request For Stay Lack Any Merit

The Press Communications Application seeks review and a stay of the Order without demonstrating why either should be granted.³⁵ Indeed, much of the Press Communication Application addresses matters wholly unrelated to the Order. For instance, Press Communications bemoans the historic allocation of broadcast facilities in New Jersey compared

³³ For instance, Prometheus suggests employing a much more methodical approach to authorizing power increases, Prometheus Application at 11, but the Bureau found no basis in the record to justify such an approach. See Order, 25 FCC Rcd. at 1191.

³⁴ Compare Iowa v. FCC, 218 F.3d 756, 759 (D.C. Cir. 2000) (in determining whether the Iowa Communications Network ("ICN") was a common carrier, the Commission failed to address whether the offering of services to all potential customers to whom the carrier, under state law, may provide services made the ICN a common carrier).

³⁵ Under Commission precedent, stays are rarely granted, and only after the applicant has satisfied a rigorous test. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Memorandum Opinion and Order, 66 F.C.C.2d 466 (1977). The Press Communications Application does not even cite, let alone, substantiate the elements of a stay.

to its immediate geographic neighbors.³⁶ Even when Press Communications strays closer to the subject of the Order, it offers little to justify Commission review. For instance, it contends that the Commission should have conducted a spectrum auction in lieu of or in connection with the original authorization of IBOC.³⁷

The Press Communications Application is also confused on the technical merits. It contends that, at the time the Commission authorized use of the iBiquity IBOC system, "it was well recognized and universally understood that the digital signal would not extend as far as the analog companion."³⁸ A few pages later, however, Press Communications quotes an iBiquity statement that digital coverage would extend beyond the analog companion as the basis for the same Commission decision authorizing IBOC.³⁹

Finally, while we reject as unfounded the more extreme claims of interference,⁴⁰ neither the Order nor the Commission's decision authorizing HD Radio assume the complete absence of interference. The Commission has acknowledged that the introduction of radiofrequency energy into a mature spectrum band requires trade-offs between service and interference.⁴¹ In issuing the Order, the Bureau minimized the likely occurrence of interference, included a rigorous

³⁶ See Press Communications Application at 10-15.

³⁷ Though beyond the scope of the Order, this contention also fundamentally miscomprehends the Commission's auction authority, which is predicated on a threshold determination of *whether* to accept mutually exclusive applications, not a mandate to auction spectrum in every conceivable instance. 47 U.S.C. § 309(j)(1).

³⁸ See Press Communications Application at 5.

³⁹ See *id.* at 7.

⁴⁰ See *id.* at 7 n.5.

⁴¹ See note ⁴, *supra*.

process for addressing claims of interference, and promised to act if the incidence and severity of interference proved to be a greater problem than the record indicated, all while enabling stations to replicate their analog coverage with digital service as the Commission intended.

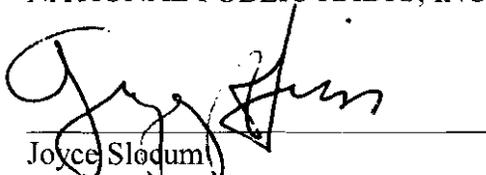
In these circumstances, we submit, there is no reason to review the Order.

Conclusion

Based on the foregoing, the Commission should deny the Prometheus and Press Communications Applications for Review.

Respectfully submitted,

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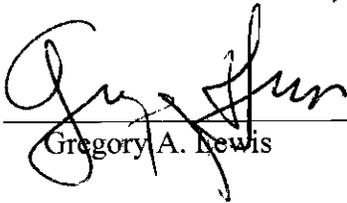
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